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NATIONAL CONFERENCE OF BAR EXAMINERS

11
12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14

15 STEPHANIE ENYART,

16 Plaintiff,

17 v.

18 NATIONAL CONFERENCE OF BAR
EXAMINERS,

19 Defendant.
20

Case No. C09-05191 CRB

**DECLARATION OF WENDY BRENNER IN
SUPPORT OF DEFENDANT'S OPPOSITION
TO PLAINTIFF'S MOTION FOR THIRD
PRELIMINARY INJUNCTION**

Date: February 11, 2011

Time: 10:00 a.m.

Courtroom: 8

Judge: Hon. Charles Breyer

21 I, Wendy Brenner, declare:

22
23 1. I am an attorney licensed to practice law in the State of California. I am a partner
24 with the firm of Cooley LLP, attorneys of record for Defendant National Conference of Bar
25 Examiners ("NCBE"). I have personal knowledge of the facts contained in this Declaration and
26 could and would testify competently to the same if called as a witness.

27 2. On March 3, 2010, I received a telephone call from Dan Goldstein, one of Ms.
28 Enyart's attorneys in this matter. During that call, he expressed to me that he had spoken to my

1 colleague, Gregory Tenhoff, the previous day concerning two requests from Ms. Enyart with
 2 respect to the MPRE that she was scheduled to take several days later: (1) access to the MPRE
 3 test site the day before the examination for set up purposes; and (2) configuration of the test in
 4 Arial 14-point font. Mr. Goldstein said that he had tried to reach Mr. Tenhoff that day, but
 5 because Mr. Tenhoff was out of the office for a deposition, he was seeking a response from me.

6 **3.** Later in the day on March 3, 2010, I telephoned Mr. Goldstein and told him the
 7 following: (a) Ms. Enyart's MPRE had already been loaded and sent to Ms. Enyart's testing
 8 location, and thus the font could not be changed; (b) NCBE did not control the testing facility,
 9 and thus could not provide access to the facility the day before the test; and (c) he should direct
 10 the request concerning set up time to ACT, since it controlled access to the testing facility.
 11 During this call, Mr. Goldstein asked whom Ms. Enyart should call at ACT concerning Ms.
 12 Enyart's test administration. Later that day, on March 3, 2010, I sent Mr. Goldstein an email
 13 informing Mr. Goldstein that Ms. Enyart should contact the individual who signed her testing
 14 letter from ACT to obtain information about her testing center. A true and correct copy of that
 15 email is attached hereto as Exhibit A. Mr. Goldstein replied on March 4, 2010, with an email
 16 stating that Ms. Enyart's testing letter did not contain any contact information, but that one of Ms.
 17 Enyart's other attorneys had reached out to counsel for ACT for more information. A true and
 18 correct copy of that email is attached hereto as Exhibit A.

19 **4.** Following the Court's June 4, 2010 hearing on Plaintiff's motion for a second
 20 preliminary injunction, on June 7, 2010, Mr. Goldstein sent an email to our offices inviting us to
 21 "look at the last proposed order we submitted" and provide comments. A true and correct copy of
 22 that email is attached hereto as Exhibit B. This email was provided to me by the recipient of the
 23 email, my colleague, Gregory Tenhoff, another Cooley LLP partner working on this matter.

24 **5.** On June 8, 2010, I sent a draft proposed order on Ms. Enyart's motion for a second
 25 preliminary injunction to Mr. Goldstein. A true and correct copy of that email is attached hereto
 26 as Exhibit C. This draft differed from the proposed terms for Ms. Enyart's first preliminary
 27 injunction because it specified that the examination would be in Arial 14-point font; the laptops
 28 would be delivered two days before the examinations; and Ms. Enyart would be able to access the

1 laptop at least twenty-four hours before the examinations.

2 6. On June 10, 2010, I received an email from Anna Levine, one of Ms. Enyart's
3 attorneys in this matter, which attached a revised draft of the proposed injunction language that I
4 had sent to Mr. Goldstein. A true and correct copy of that email is attached hereto as Exhibit D. I
5 responded to Ms. Levine's message on June 14, 2010, with an email stating that her changes were
6 "generally fine," and that I had only minor additional revisions to the document. A true and
7 correct copy of that email is attached hereto as Exhibit E. Ms. Levine replied on June 14, 2010
8 with an email stating that my further changes were acceptable. A true and correct copy of that
9 email is attached hereto as Exhibit F.

10 7. On August 2, 2010, our offices received an email from Larry Paradis, another
11 attorney representing Ms. Enyart in this matter. This email was provided to me by Mr. Tenhoff's
12 assistant as Mr. Tenhoff was traveling on vacation. The email stated that Ms. Enyart had just
13 completed the MBE, and had "encountered technical difficulties again," although the problems
14 were "different than those she encountered during the previous test administration." Mr. Paradis's
15 email stated that the problem related to a "lack of synchronization between the JAWS and
16 ZoomText programs" that resulted in "difficulties wherein the cursor on the ZoomText screen
17 was not matching up to the material being read out loud by the JAWS program." Mr. Paradis's
18 email further stated that the problems were "intermittent in that when Ms. Enyart first inputted the
19 settings on the programs, the two programs would work properly together for a while, but then
20 after a period of time they would stop coordinating." Mr. Paradis's email stated that one
21 "possible reason" for the problem was an antivirus program that had not been renewed. Mr.
22 Paradis's email was directed to ACT, and requested assistance from ACT relating to the MPRE
23 that Ms. Enyart was scheduled to take several days later. Specifically, Mr. Paradis's email
24 requested the following: (1) that ACT ensure any antivirus software on the computer would be
25 updated or deleted; (2) that the operating system would be Windows XP; (3) that the computer
26 would be checked to ensure that the programs were working together properly; and (4) that the
27 ACT personnel present at the set up have "administrative privileges" for the laptop so that any
28 problems could be fixed. A true and correct copy of that email is attached hereto as Exhibit G.

1 **8.** On August 2, 2010, our offices received a second email from Mr. Paradis, which
2 was also provided to me by Mr. Tenhoff's assistant. The second email inquired whether NCBE
3 "will have its IT personnel available" during Ms. Enyart's set up and testing and "provide the
4 administrative privileges password if that is needed." A true and correct copy of that email is
5 attached hereto as Exhibit H.

6 **9.** On August 3, 2010, I sent an email to Mr. Paradis stating that NCBE's IT person
7 was "on standby and ready to help ACT as necessary." A true and correct copy of that email is
8 attached hereto as Exhibit I.

9 **10.** On August 5, 2010, I received an email message from Mr. Paradis asking if I could
10 instruct NCBE's IT personnel to call Ms. Enyart's technical advisor because Ms. Enyart had
11 encountered "the technical difficulty" that remained "a problem." A true and correct copy of that
12 email is attached hereto as Exhibit I. Within the hour, I responded to Mr. Paradis's message
13 directing him to instruct Ms. Enyart's IT consultant to contact Derek Binkley at NCBE, and
14 further providing Mr. Binkley's contact information. A true and correct copy of that email is
15 attached hereto as Exhibit J.

16 **11.** On December 3, 2010, the Court held a motion on NCBE's Motion to Continue
17 the Trial Date. I was informed by my colleague, Mr. Tenhoff, that following the hearing, Ms.
18 Levine told Mr. Tenhoff that with respect to a third preliminary injunction, Ms. Enyart wanted
19 modifications to the previous injunctions to address the technical issues that had arisen during the
20 previous administrations of the examinations. On December 8, 2010, I called Ms. Levine to meet
21 and confer regarding the terms of a third preliminary injunction for Ms. Enyart. I left her a
22 message asking her to call me back.

23 **12.** Following my call to her, on December 8, 2010, I received an email from Ms.
24 Levine setting forth a proposal to address technical issues reported by Ms. Enyart on the July
25 2010 MBE and August 2010 MPRE. A true and correct copy of that email is attached hereto as
26 Exhibit K. Ms. Enyart's "technical proposal" centered around Ms. Enyart providing the laptop
27 for the MBE, as opposed to NCBE providing the laptop, and further involved NCBE shipping the
28 secure test questions on a CD.

1 **13.** On December 9, 2010, I sent Ms. Levine an email stating that I would call her later
2 that day to discuss the “technical proposal,” but that NCBE would not permit Ms. Enyart to use
3 her own computer on the February 2011 MBE. I further reiterated that NCBE did not oppose the
4 same terms that had previously been agreed to. A true and correct copy of that email is attached
5 hereto as Exhibit L.

6 **14.** On December 9, 2010, I received an email from Ms. Levine in response to my
7 email. A true and correct copy of that email is attached hereto as Exhibit M. In her email, Ms.
8 Levine clarified that Ms. Enyart was not seeking to use “her own computer,” but rather she was
9 proposing that she would purchase a new computer that she would provide to NCBE preloaded
10 with her preferred software and peripheral drivers.

11 **15.** Later that day, on December 9, 2010, I had a telephone conversation with Ms.
12 Levine concerning Ms. Enyart’s technical proposal. During that call, I told Ms. Levine that
13 NCBE could not agree to Ms. Enyart’s technical proposal because it created additional
14 complexity, without any promise of improved results, and would most likely result in additional
15 problems. I further reminded Ms. Levine that it was not clear what caused the synchronicity
16 problems on the July and August administrations of the examinations, and that the reported
17 problems were not present when the NCBE tested the laptop before shipping. In response to
18 these concerns, Ms. Levine suggested that one potential solution was to allow Ms. Enyart to set
19 up her equipment at the beginning of the California Bar examination, as opposed to immediately
20 prior to the MBE portion of the exam.

21 **16.** Following this telephone call, I received an email from Ms. Levine setting forth a
22 new proposal. A true and correct copy of that email is attached hereto as Exhibit N. In that
23 proposal, Ms. Levine stated that Ms. Enyart would be willing to use NCBE’s computer
24 “provided she has adequate time and support beforehand to ensure that the software is working
25 and everything is set up, so that she does not need to deal with technological issues in the middle
26 of the examination week.” Ms. Levine further stated that “an alternative proposal that would
27 address her concerns is that we largely keep to the terms of the second preliminary injunction, but
28 extend the time and support for set up prior to the examination.” Ms. Levine then set forth a

1 proposal whereby NCBE would make the laptop available on February 17, 2011 for inspection by
 2 Ms. Enyart and a “tech person of [her] choice” to set up and test the computer. Ms. Levine
 3 further stated that the inspection would need to involve someone “who has administrative
 4 privileges to alter programs on the laptop, if necessary.” Ms. Levine’s proposal then requested
 5 that computer be made available on February 21, 2011 for a second inspection, and that “[f]rom
 6 that time forward until Stephanie takes the MBE portion of the exam...the NCBE laptop would
 7 remain set up with the peripherals.”

8 **17.** Following receipt of that email, I received a second email from Ms. Levine on
 9 December 9, 2010, providing a list of specific software versions that Ms. Enyart wanted for the
 10 examination. A true and correct copy of that email is attached hereto as Exhibit N.

11 **18.** On December 20, 2010, I sent a letter to Ms. Levine and Mr. Paradis, a true and
 12 correct copy of which is attached hereto as Exhibit O. This letter set forth NCBE’s response to
 13 Ms. Enyart’s proposals of December 9, 2010. Specifically, the letter stated the following:

14 (a) NCBE would make the NCBE-provided laptop available to Ms. Enyart for
 15 inspection and set-up on February 17, 2011, and provide her with access again on February 21,
 16 2011.

17 (b) Provided the California State Bar could manage storage and ensure
 18 security, NCBE would permit the laptop computer to remain set up from February 21, 2011 until
 19 Ms. Enyart takes the MBE on February 26 and 27, 2011.

20 (c) NCBE would make an NCBE representative available by telephone on
 21 February 17, 2011 and February 21, 2011, at a pre-established, mutually convenient time between
 22 8:30 a.m. and 4:00 p.m. CST, to assist Ms. Enyart with troubleshooting any technical or
 23 compatibility issues.

24 The letter further confirmed that for security reasons, NCBE would not provide administrative
 25 privileges to anyone.

26 **19.** On December 21, 2010, I received a letter from Ms. Levine, responding to my
 27 letter of December 20, 2010. A true and correct copy of that email is attached hereto as
 28 Exhibit P. In that letter, Ms. Levine stated that any preliminary injunction order “must include

1 the opportunity for someone with administrative privileges to address any problem that requires
2 such privileges.”

3 **20.** On December 22, 2010, I sent a letter to Ms. Levine and Mr. Paradis, a true and
4 correct copy of which is attached hereto as Exhibit Q. This letter responded to Ms. Enyart’s
5 requests concerning specific software versions. Specifically, the letter stated that NCBE was
6 willing to work with Ms. Enyart on obtaining her preferred software versions, however, not all
7 such versions were still available and thus NCBE required additional instructions from Ms.
8 Enyart.

9 **21.** On December 23, 2010, I sent another letter to Ms. Levine, a true and correct copy
10 of which is attached hereto as Exhibit R. This letter responded to Ms. Levine’s letter of
11 December 23, 2010 concerning administrative privileges. Specifically, the letter reiterated that
12 NCBE would not delegate administrative privileges.

13 **22.** On December 29, 2010, I received a letter from Ms. Levine, a true and correct
14 copy of which is attached hereto as Exhibit S. In that letter, Ms. Levine responded to NCBE’s
15 earlier request for additional guidance concerning Ms. Enyart’s preferred software versions.
16 Specifically, the letter stated that because “the newer versions [of JAWS and ZoomText] do not
17 work reliably together,” Ms. Enyart preferred to use a combination of JAWS and MAGic (the
18 magnification product produced by the manufacturer of JAWS).

19 **23.** On January 5, 2011, I received another letter from Ms. Levine, a true and correct
20 copy of which is attached hereto as Exhibit T. In this letter, Ms. Levine again articulated Ms.
21 Enyart’s request that NCBE delegate administrative privileges for the laptop provided to Ms.
22 Enyart for the February 2011 MBE, and further stated for the first time that the laptops previously
23 provided by NCBE were not in “working order.”

24 **24.** Due to the impasse between the parties, on January 7, 2011, we invited Ms.
25 Enyart’s counsel to speak directly to NCBE’s technical staff so that they could explain to Ms.
26 Enyart’s counsel directly the nature of the technical issues raised by Ms. Enyart’s request for
27 delegation of administrative privileges. I was informed by NCBE that NCBE employees Kent
28 Brye and Derek Binkley had a telephone conversation on January 7, 2011 with technical

1 personnel at the National Federation of the Blind, who are apparently consulting with Ms. Enyart
2 and/or her counsel on these technical issues.

3 **25.** Following this conversation, on January 10, 2011, I spoke to Ms. Levine, who told
4 me that despite the telephone conversation between NCBE personnel and Ms. Enyart's technical
5 team, Ms. Enyart continued to believe that the delegation of administrative privileges was
6 necessary, and that any security issues could be overcome.

7 **26.** On January 11, 2011, I again telephoned Ms. Levine, and conveyed that NCBE
8 was willing to schedule another call between the Parties' technical personnel, provided that the
9 participant for Ms. Enyart was the actual technical expert who would be present for the exam set
10 up; and (2) NCBE was willing to pre-test Ms. Enyart's peripherals, provided she identifies what
11 she intends to use and they can be obtained. On January 11, 2011, I received a letter from Ms.
12 Levine, a true and correct copy of which is attached hereto as Exhibit U, rejecting these
13 proposals.

14 **27.** Following receipt of Ms. Levine's January 11, 2011 letter, I telephoned Mr.
15 Goldstein to explore whether there was any remaining way to resolve this issue. Mr. Goldstein
16 responded to my voicemail with an email on January 12, 2011 offering to discuss this matter with
17 me directly. A true and correct copy of Mr. Goldstein's email is attached hereto as Exhibit V.

18 **28.** Mr. Goldstein and I conferred by telephone on January 12, 2011. During that
19 discussion, Mr. Goldstein told me that although he appreciated the offer to pre-test Ms. Enyart's
20 peripherals, the parties would remain at an impasse unless NCBE could guarantee that
21 administrative privilege would be granted in the event the laptop did not function to her standards
22 upon receipt and there was some reason to believe the problem could be fixed with the
23 application of administrative privileges. I communicated to Mr. Goldstein during our telephone
24 call that NCBE could not agree to these terms.

25 **29.** On January 13, 2010, I sent a letter to Ms. Levine further clarifying NCBE's
26 position on these issues, a true and correct copy of which is attached hereto as Exhibit W.

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1 Executed this 20th day of January, 2011 in Palo Alto, California.

2 I declare under the penalty of perjury under the laws of the United States that the
3 foregoing is true and correct.

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Wendy Brenner

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